Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

H. N. AND FRANCES C. BERGER FOUNDATION,
Petitioner,

v.

CITY OF ESCONDIDO, JERRY HARMON, individually and as a member of the City of Escondido Mobilehome Rent Review Board; SID HOLLINS, individually and as a member of the City of Escondido Mobilehome Rent Review Board; RICHARD A. FOSTER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; LORI HOLT PFEILER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; ELMER CAMERON, individually and as a member of the City of Escondido Mobilehome Rent Review Board,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITION FOR WRIT OF CERTIORARI

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

85pp

QUESTION PRESENTED

Does the application of Escondido's mobile home park rent control law, which transfers marketable interests in Petitioner's realty to certain residents of Petitioner's mobile home park without just compensation, comprise a regulatory taking in violation of the Fifth and Fourteenth Amendments?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Escondido's Mobile Home Rent Control Ordinance and the *Yee* Litigation 2

B. The Rent Ordinance Is Applied to the Berger Foundation's Property 3

C. The Berger Foundation Files Its Regulatory Takings Claim 4

D. The Trial Court Rejects This Court's Reasoning in *Yee* and Grants the City's Motion for Nonsuit 5

E. The Court of Appeal Affirms, Rejecting This Court's *Yee* Analysis in Favor of a Deferential "Rational Basis" Standard of Review 6

REASONS FOR GRANTING THE PETITION 8

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE REGULATORY TAKINGS ISSUE RAISED BUT LEFT OPEN BY THIS COURT IN *YEE v. CITY OF ESCONDIDO* 8

TABLE OF CONTENTS—Continued

Page

II. THE DECISION BELOW, FINDING NO REGULATORY TAKING FROM THE APPLICATION OF ESCONDIDO'S MOBILE HOME RENT CONTROL LAW, DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *RICHARDSON v. CITY AND COUNTY OF HONOLULU* 11

III. THE EXTREMELY DEFERENTIAL STANDARD OF REVIEW APPLIED BY THE COURT BELOW DRAINS ALL SUBSTANCE FROM THIS COURT'S DIRECTION THAT PROPERTY REGULATIONS CHALLENGED UNDER THE TAKINGS CLAUSE MUST SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS, CONFLICTING NOT ONLY WITH THIS COURT BUT ALSO WITH THE HIGHEST STATE COURT OF NEW YORK 15

A. The Court Below Applied the Lowest Conceivable Standard of Review to the Berger Foundation's "Substantial Advancement" Claim 17

B. The Court Below Recognized That Its Deferential Approach to the Substantial Advancement Issue Conflicts with This Court's Mandate of Heightened Judicial Scrutiny but Chose to Follow Conflicting State Court Precedent 19

TABLE OF CONTENTS—Continued

Page

C. The Opinion Below Reflects a Systemic Conflict Between the State Courts of California and New York on the Appropriate Level of Scrutiny in Regulatory Takings Cases Brought Under the Fifth Amendment 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 7

Dolan v. City of Tigard, 512 U.S. 374 (1994) 6-7, 16, 20-22

Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761 (1997) 20

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470 (1987) 14

Landgate v. California Coastal Commission, 17 Cal. 4th 1006 (1998) 20

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994) 21

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 10

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) 11-15

Santa Monica Beach, Ltd., v. Superior Court, 968 P.2d 993, 81 Cal. Rptr. 2d 93 (1999) 18

Seawall Associates v. City of New York, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989) 20-21

Yee v. City of Escondido, 503 U.S. 519 (1992) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Statutes

28 U.S.C. § 1258(a) 1

California Civil Code § 798.55 2

§ 798.73 2

§ 798.74 2

United States Constitution

Fifth Amendment 1, 3, 6, 8, 10, 20

Fourteenth Amendment 1, 4, 6, 10

Rules of Court

Supreme Court Rule 13.1 1

Miscellaneous

Kari Anne Gallagher, *Comment, Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 Notre Dame L. Rev. 821 (1992) 16

Dwight C. Hirsh IV, *Yee v. City of Escondido-- A Rejection of the Ninth Circuit's Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners' Regulatory Takings Claims*, 24 Pac. L.J. 1681 (1993) 16

Petitioner H. N. and Frances C. Berger Foundation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, entered in the above-entitled proceeding on August 17, 1998.

OPINIONS BELOW

The decision of the Court of Appeal of the State of California is unreported and is reproduced as Appendix (App.) A. The final judgment of the California Superior Court is unreported and is reproduced as Appendix C.

JURISDICTION

The opinion of the Court of Appeal of the State of California that is the subject of this petition was filed and entered on August 17, 1998. App. A. The order of the California Supreme Court denying Petitioner's petition for review was entered on November 24, 1998. App. B. The California Court of Appeal considered and decided the question of whether evidence purporting to show that a mobile home rent control ordinance failed to substantially advance legitimate state interests supported a claim for an uncompensated regulatory taking of Petitioner's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

Escondido Municipal Code § 29-101, *et seq.*, codifies an "Ordinance of the City of Escondido Establishing Mobilehome Rent Protection," popularly known as Proposition K (Rent Ordinance), which imposes rent control on privately owned

mobile home parks in Escondido. The full text of the Rent Ordinance is reproduced at Appendix E.

The California Mobilehome Residency Law (Residency Law), codified at Section 798, *et seq.* of the California Civil Code, regulates mobile home space tenancies and the operation of mobile home parks. Park owners cannot (1) terminate tenancies without specified cause;[1] (2) require removal of mobile home coaches when tenancies end;[2] or (3) disapprove incoming tenants who purchase mobile home coaches so long as the purchasers are creditworthy and unlikely to violate park rules.[3] Pertinent portions of the Residency Law are reproduced at Appendix F.

STATEMENT OF THE CASE

This case involves a regulatory takings challenge to the same ordinance that was challenged as a physical taking in *Yee v. City of Escondido,* 503 U.S. 519 (1992).

A. Escondido's Mobile Home Rent Control Ordinance and the *Yee* Litigation

On June 7, 1988, Respondent City of Escondido (City) enacted Escondido Municipal Code (EMC) § 29-101, *et seq.* Under the terms of the Rent Ordinance, space rents in privately owned mobile home parks in Escondido were rolled back to the levels in effect on January 1, 1986, and could not thereafter be increased without the approval of the City Council, sitting as the Mobilehome Rental Review Board (Rent Board).[4]

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[1] Calif. Civ. Code § 798.55, App. F-1.

[2] Calif. Civ. Code § 798.73, App. F-2.

[3] Calif. Civ. Code § 798.74, App. F-3-4.

[4] App. D-3.

Shortly after the enactment of the Rent Ordinance, several owners of affected mobile home parks brought suit, alleging that the law, in conjunction with California's Mobilehome Residency Law, authorized a permanent physical invasion of their property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. These claims were ultimately rejected by this Court in *Yee*. Although it found that the Rent Ordinance did not constitute a permanent physical invasion of park owners' property, this Court expressly left open the question of whether the law effected a regulatory taking by failing to substantially advance legitimate state interests.[5]

B. The Rent Ordinance Is Applied to the Berger Foundation's Property

Petitioner H. N. and Frances C. Berger Foundation (Berger Foundation) is a charitable foundation that includes among its assets the Town and Country Club Mobilehome Park (Town and Country), a park that is subject to Escondido's Rent Ordinance.[6]

In December of 1991, the Berger Foundation filed an application with the Rent Board requesting an average rent increase at the Town and Country of $69.70 per space per month.[7] Over two years later, on January 12, 1994, the Rent Board granted a rent increase of only $10 per space per month.[8] This amounted to a 20% *decrease* in real rents from the levels that had been in effect at the Town and Country in January, 1986.[9]

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[5] *Yee*, 503 U.S. at 527, 530, 531, 538.

[6] Court of Appeal Appellant's Appendix (AA) at 2.

[7] *Id.* at 223.

[8] *Id.* at 181.

[9] *Id.* at 182.

C. The Berger Foundation Files Its Regulatory Takings Claim

The Berger Foundation filed this suit in February of 1994, alleging that the City's actions effected an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The core allegations of the complaint were substantially identical to those that were raised in *Yee*:

> Residents of the Town and Country have the right (under the Residency Law) to occupy their spaces indefinitely at below market rents, as well as the right to sell their mobile home coaches in place to a buyer of their choosing. Under the Rent Ordinance, the buyer in such a sale acquires not just the mobile home coach but the right to occupy a space in the Town and Country indefinitely at below market rents.
>
> . . . .
>
> When a resident of the Town and Country sells his or her mobile home coach, a premium is received from the purchaser corresponding to the coach's increased value attributable to the City's enforcement of the Rent Ordinance. This premium, which is paid for the transfer of a valuable property interest rightfully belonging to the Berger Foundation, will never be recovered by either the foundation or any subsequent resident of the Town and Country.[10]

This one-time wealth transfer accrues only to the initial residents of the Town and Country at the time the Rent Ordinance was adopted; subsequent buyers of mobile homes in rent controlled parks must pay the full expected value of the

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[10] First Amended Complaint, AA at 5-6.

continued application of the Rent Ordinance.[11] Consequently, the Berger Foundation argued, the law fails to substantially advance the goal of preserving the supply of affordable rental housing--or any other objective except maintaining the value of the one time wealth transfer from the Berger Foundation to the initial residents of the Town and Country, some or all of whom may not yet have cashed in their premiums by selling their coaches.[12]

Prior to trial, the parties stipulated that the market value of the Town and Country had been depressed by operation of the Rent Ordinance and that, but for the City's application of the law, the Berger Foundation would have implemented rent increases of more than $10 per space in 1991.[13] The parties also agreed that the Berger Foundation did not contend it had been denied a "fair return" on the Town and Country nor that it had been deprived of "substantially all economically viable use of its land."[14] The issue was thus narrowed to whether the Rent Board's actions substantially advanced legitimate state interests within the meaning of this Court's analysis in *Yee*.

D. The Trial Court Rejects This Court's Reasoning in *Yee* and Grants the City's Motion for Nonsuit

On June 17, 1996, the Berger Foundation made its opening statement at trial.[15] Tracking this Court's regulatory takings analysis in *Yee*, the Berger Foundation stated it was prepared to offer expert testimony that the application of the Rent Ordinance to the Town and Country served only to perpetuate the one-time

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[11] *Id.* at 184.

[12] *Id.* at 183-85.

[13] AA at 228.

[14] *Id.*

[15] *Id.* at 176.

wealth transfer described in *Yee*.[16] The City did not contest this evidence or suggest the existence of any contrary evidence, but immediately entered a motion for nonsuit which was granted.[17] In its statement of decision, the trial court rejected this Court's *Yee* analysis, citing to state appellate court decisions as having "previously rejected park owner arguments that this Ordinance and other similar mobilehome rent ordinances do not advance legitimate state interests."[18] The court also ruled that regulatory takings claims such as the one at bar do not receive heightened judicial scrutiny, as mandated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[19]

A judgment of dismissal as to the entire complaint was entered on August 30, 1996.[20]

E. The Court of Appeal Affirms, Rejecting This Court's *Yee* Analysis in Favor of a Deferential "Rational Basis" Standard of Review

On appeal, the Berger Foundation's opening brief raised the federal constitutional issue of whether the application of the Rent Ordinance effected an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments, as well as the applicability of heightened scrutiny under *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Berger Foundation argued that this Court has established that land use regulations will effect a regulatory taking if they fail to "substantially

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[16] *Id.* at 184-85.

[17] *Id.* at 109.

[18] App. D-13.

[19] *Id.*

[20] App. C-1.

advance legitimate state interests."[21] In the context of mobile home rent control, *Yee* identified this "substantial advancement" test with the core factual issue raised by the Berger Foundation in the present case: whether the application of the law merely effects a transfer of ownership interests from park owners to initial park residents, with no residual benefits to any other individuals.[22]

Nevertheless, the court below summarily rejected these considerations as being irrelevant to the Berger Foundation's regulatory takings claim. Instead of following the reasoning of this Court in *Yee*, the court below employed a trivial and meaningless interpretation of the "substantial advancement" standard. Pointing to no evidence whatsoever to support its ruling (since the City had advanced none), the court of appeal concluded that the Escondido ordinance substantially advanced legitimate state interests because some park residents might be living on fixed incomes, and such hypothetical residents, if they existed, would "***certainly***" be benefited if they paid lower rents because of the ordinance.[23]

By trivializing the concept of "substantial advancement," hypothesizing the existence of evidence to meet this reduced threshold, and ignoring contrary evidence outlined in the Berger Foundation's opening statement, the court below makes a travesty of this Court's regulatory takings analysis in *Yee v. City of Escondido*. This decision also directly conflicts with the takings jurisprudence of the Ninth Circuit Court of Appeals and the highest state court of New York.

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[21] *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan*, 483 U.S. at 834; *Dolan*, 512 U.S. at 385.

[22] *Yee v. City of Escondido*, 503 U.S. at 530.

[23] App. A-19.

The Berger Foundation filed a timely petition for review to the California Supreme Court, which was denied on November 24, 1998.[24]

REASONS FOR GRANTING THE PETITION

I

THE PETITION SHOULD BE GRANTED TO RESOLVE THE REGULATORY TAKINGS ISSUE RAISED BUT LEFT OPEN BY THIS COURT IN *YEE v. CITY OF ESCONDIDO*

This case involves a Fifth Amendment takings challenge to the same ordinance that was before this Court in *Yee v. City of Escondido*, 503 U.S. 519. In *Yee*, the petitioners alleged that Escondido's Rent Ordinance effected a permanent physical invasion of their mobile home parks. This Court rejected the Yees' physical takings premise, but left the door open to a *regulatory* takings claim. Like the present Petitioner, the plaintiffs in *Yee* alleged that

> the rent control ordinance has transferred a discrete interest in land--the right to occupy the land indefinitely at a submarket rent--from the park owner to the mobile home owner.[25]

While recognizing the relevance of this claim in a Fifth Amendment takings context, the Court found it inappropriately characterized as a *physical* taking:

> This argument, ***while perhaps within the scope of our regulatory taking cases***, cannot be squared easily with our cases on physical takings.[26]

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[24] App. B-1.

[25] *Yee*, 503 U.S. at 527.

[26] *Id.* (emphasis added).

The *Yee* Court took careful note of the plaintiffs' allegations--mirrored by the complaint in the present case--that

> the ordinance benefits incumbent mobile home owners without benefiting future mobile home owners, who will be forced to purchase mobile homes at premiums. . . . [A] typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner.[27]

Again, however, the Court found the legal issue infelicitously posed:

> ***This effect might have some bearing on whether the ordinance causes a regulatory taking***, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.[28]

A third time, the Court turned to the specific allegations of the Yees' complaint and yet again returned to the theme that this challenge should have been framed as a regulatory, rather than a physical, taking:

> Again, ***this effect may be relevant to a regulatory taking argument,*** as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners that should "be compensated by the government,

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[27] *Id.* at 530.

[28] *Id.* (citing *Nollan v. California Coastal Commission,* 483 U.S. at 834-35 (emphasis added)).

> rather than remain[ing] disproportionately concentrated on a few persons."[29]

Although the *Yee* petitioners belatedly addressed a regulatory takings argument to this Court (apparently for the first time in the litigation), it was not entertained on prudential grounds.

> Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.[30]

Recognizing that no lower court anywhere in the nation had yet ruled on whether such laws effect a regulatory taking, the *Yee* Court determined to

> leave the regulatory taking issue for the California courts to address in the first instance.[31]

That issue has now been addressed. Twenty months after *Yee* was handed down, the present case was brought expressly to take up this Court's invitation to determine whether Escondido's mobile home park rent control effects a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

As was true in *Yee*, California's Fourth District Court of Appeal has upheld the Rent Ordinance against claims that it violates park owners' federal constitutional rights, this time in the context of a regulatory takings challenge. Again like *Yee*, this decision stands in direct conflict with a recent opinion on the same issue by the Federal Court of Appeals for the Ninth

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[29] *Id.* at 531 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (emphasis added)).

[30] *Id.* at 538.

[31] *Id.*

Circuit. All of the contingencies that prevented the Court from reaching the regulatory takings issue in *Yee* have been resolved. It is time for this Court to revisit the question it raised but left unanswered in *Yee*: does the operation of Escondido's Rent Ordinance constitute a regulatory taking of mobile home park owners' property?

II

THE DECISION BELOW, FINDING NO REGULATORY TAKING FROM THE APPLICATION OF ESCONDIDO'S MOBILE HOME RENT CONTROL LAW, DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *RICHARDSON v. CITY AND COUNTY OF HONOLULU*

The *Yee* Court noted that there were important "institutional" reasons to grant certiorari in that case, referring to a direct conflict between the California appellate court and the Ninth Circuit Court of Appeals on whether laws like the Rent Ordinance comprised *physical* takings.[32] Equally strong considerations warrant granting the present petition, since there is now a conflict between the same California court and the Ninth Circuit on whether ordinances of this kind give rise to a *regulatory* taking.

In *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the Ninth Circuit struck down a rent control law that was conceptually identical to Escondido's on the same legal theory Petitioner advanced in the court below.[33] Like

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[32] *Id.* at 537-38.

[33] *Richardson* involved a challenge, on various grounds, both to a condominium rent control law (Ordinance 91-96) and to statutory procedures mandating the sale of condominium buildings to their residents (Ordinance 91-95). 124 F.3d at 1153. Only the regulatory takings challenge to the rent control law is relevant to this Petition.

the relationship between mobile homes and mobile home parks in Escondido,

> the land underneath condominiums on Oahu ordinarily is owned by someone other than the owner of the condominium. The condominium owner leases the ground under the condominium, ordinarily for . . . a term of years, after which the rent is subject to renegotiation. . . . [T]he Ordinance caps rents by linking the maximum renegotiated rent to the consumer price index.[34]

In addition to its close resemblance to Escondido's Rent Ordinance, Honolulu's Ordinance 91-96 also included provisions equivalent to the relevant portions of California's Mobilehome Residency Law:

> The Ordinance also contemplates the conveyance of condominiums subject to renegotiated leases on the underlying land. Section 1.10 of the Ordinance facilitates the conveyance or transfer of these renegotiated leases. That section provides that, if an owner-occupant of a condominium conveys or transfers the leasehold interest in the underlying land during a renegotiated rent period to a person who intends to occupy the condominium apartment, the renegotiated land rent shall apply to the transferee tenant. Id. § 1.10. In other words, the owner-occupant of a condominium is free to convey his or her leasehold interest in the underlying land to a person intending to occupy the condominium and the transferee will receive the benefit of the renegotiated land lease.[35]

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[34] *Id.* at 1163.

[35] *Id.* at 1163-64.

In response to this regulatory scheme, the Bishop Estate raised a regulatory takings claim that was indistinguishable from Petitioner's argument in the present case:

> the Estate contends that Ordinance 91-96 fails to substantially further its stated public purposes and, therefore, constitutes a regulatory taking because the Ordinance allows a lessee to monetize a below-market renegotiated rent at the expense of the lessor.[36]

Indeed, like the present Petitioner, the *Richardson* plaintiff modeled its regulatory takings claim on this Court's analysis in *Yee v. City of Escondido*:

> The Bishop Estate makes a similar challenge to Ordinance 91-96. It contends that the Ordinance's conveyance provisions create a premium, which an owner-occupant can capture when she sells a condominium subject to a renegotiated land rent. If the transferee intends to occupy the condominium, she receives the benefit of the renegotiated rent. Hence, the transferor will charge a premium reflecting the net present value of the difference between the renegotiated land rent and the free market land rent.[37]

The Ninth Circuit found the reasoning of *Yee* compelling and struck down Ordinance 91-96 for failing to substantially advance its admittedly legitimate objectives:

> Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. Ordinance 91-96 does not do

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[36] *Id.* at 1164.

[37] *Id.* at 1165.

> this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking.[38]

The court below denied Petitioner's request to submit supplemental briefing on *Richardson* prior to oral argument and issued an opinion that directly conflicts with the federal court's decision. Without mentioning the *Richardson* opinion, the appellate panel implicitly sought to distinguish the cases on the grounds that *Richardson* involved a *facial* challenge to the legitimacy of Honolulu's rent control law, while the Berger Foundation alleges that the law is constitutionally invalid as applied to its particular property.[39] However, this distinction cuts the wrong way. Because it involved a facial challenge, the *Richardson* opinion must be read to hold that laws such as the Rent Ordinance effect a regulatory taking by their mere enactment;[40] the ordinance "does not 'substantially advance' a

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[38] *Id.* at 1165-66.

[39] App. A-16-17.

[40] *See Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 495 (1987).

'legitimate state interest' ***no matter how it is applied.***"[41] In other words, *Richardson* says laws like the Rent Ordinance *always* effect regulatory takings regardless of the facts of a specific case, while the court below insists that allegations identical to those in *Richardson* do not even ***state a claim*** for a taking as applied to any particular property.[42] No stronger conflict can be imagined.

For the same reasons this Court granted the petition for certiorari in *Yee*, the present petition should be granted to resolve the conflict between the California court and the Ninth Circuit Court of Appeals on this important question of federal constitutional law.

III

THE EXTREMELY DEFERENTIAL STANDARD OF REVIEW APPLIED BY THE COURT BELOW DRAINS ALL SUBSTANCE FROM THIS COURT'S DIRECTION THAT PROPERTY REGULATIONS CHALLENGED UNDER THE TAKINGS CLAUSE MUST SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS, CONFLICTING NOT ONLY WITH THIS COURT BUT ALSO WITH THE HIGHEST STATE COURT OF NEW YORK

In *Nollan v. California Coastal Commission*, this Court established that regulatory takings claims such as the one at bar must be accorded a heightened level of judicial scrutiny.[43] Indeed, the standard of review applicable to such cases has been

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[41] *Yee*, 503 U.S. at 534 (emphasis added).

[42] Although the court of appeal ruled only with respect to the Berger Foundation's property, its analysis leaves no doubt that it would consider the substantial advancement test to be satisfied in every imaginable instance. App. A-19 (finding that rent control "substantially advances" the objective of controlling rents).

[43] 483 U.S. at 834 n.3.

likened by this Court to the heightened scrutiny mandated by the abridgment of freedom of speech or religion.[44] In the context of mobile home rent control, the factors identified by this Court in *Yee* as relevant to a regulatory takings challenge imply some form of elevated scrutiny. This fact has been recognized by commentators who have addressed the questions raised by this case:

> An examination of the facts of *Yee* ***under [Nollan's] heightened standard of review*** will show that courts would rule that Escondido's ordinance effects a regulatory taking. . . . As noted in *Yee*, the rent control ordinance only protects the first tenant of the park pad. . . . It will be difficult for courts to ignore that the rent control ordinance, which purports to benefit all tenants of mobile home parks, makes only one wealth transfer to the initial tenant. Therefore, similarly situated mobile home park owners may now successfully argue that local government has effected a regulatory taking ***under Nollan***.[45]
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> [T]he Escondido rent control ordinance, against the backdrop of the Residency Law, does not substantially advance the interest of permanently preserving moderately priced housing, and therefore, ***fails the Nollan means-ends nexus***.[46]

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[44] *Dolan v. City of Tigard,* 512 U.S. at 392.

[45] Dwight C. Hirsh IV, *Yee v. City of Escondido--A Rejection of the Ninth Circuit's Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners' Regulatory Takings Claims*, 24 Pac. L.J. 1681, 1721, 1723, 1726 (1993) (emphasis added).

[46] Kari Anne Gallagher, *Comment, Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 Notre Dame L. Rev. 821, 846-47 (1992) (emphasis added).

Nevertheless, the court below rejected this Court's *Nollan* standard, opting instead to employ the most deferential possible standard of review.[47] The seriousness of this error is demonstrated by the outcome: divorced from heightened scrutiny, this Court's "substantial advancement" test collapses to a mere shell, providing no meaningful protection for rights guaranteed under the Takings Clause.

A. The Court Below Applied the Lowest Conceivable Standard of Review to the Berger Foundation's "Substantial Advancement" Claim

The conclusion of the court below, that Escondido's Rent Ordinance substantially advances legitimate state interests, rested on the court's application of the lowest possible level of judicial scrutiny. Invoking a presumption of validity and disregarding the evidence set forth in the Berger Foundation's opening statement, the court reduced the "substantial advancement" test to a crude tautology and upheld the ordinance on the basis of the court's own speculation that facts supporting the City might conceivably exist. The appellate court's entire analysis of the substantial advancement issue consists of the following passage:

> [T]here is no doubt the Board's decision substantially advances the purpose of the Ordinance. Berger sought a rent increase of nearly $70, and the Board approved $16.12 [sic]. The tenants at the Town and Country, especially those living on fixed incomes, were certainly benefited by such a limitation on rent increases on their spaces. . . . We therefore

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[47] App. A-13-15.

> conclude the Board's decision . . . satisfies the government interest prong.[48]

What this key passage says is that by controlling rents at the Town and Country, the City has substantially advanced its objective of controlling rents! But this cannot be the way this Court intended its "substantial advancement" test to be applied. As noted in *Yee*, the inquiry should ***begin*** with the ordinance's one-time transfer of wealth to incumbent coach owners, not ***end*** there because that is what the City intended to accomplish. Such a hyperdeferential standard of review drains this Court's "substantial advancement" test of any meaningful content. If courts can simply *presume* that a law must be substantially advancing legitimate state interests because it redistributes wealth the way its sponsors intended, the fact-based inquiry outlined by this Court in *Yee* would be pointless. As a justice of the California Supreme Court recently stated:

> We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning. And if words have that power, then a requirement that a law "'substantially advance' the 'legitimate state interest' sought to be achieved" is different from a requirement that a law not be "arbitrary," and, of course, it is different from a requirement that a law have a "rational basis."[49]

Nevertheless, the court below plainly and self-consciously applied a highly deferential due process standard of review to

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[48] App. A-19. It should be noted that no evidence in the record supported the court's presumption that any of the tenants of the Town and Country were living on fixed incomes.

[49] *Santa Monica Beach, Ltd., v. Superior Court*, 968 P.2d 993, 81 Cal. Rptr. 2d 93, 137 (1999) (Chin, J., dissenting) (citation to *Nollan* omitted).

evaluate the "substantial advancement" test for a regulatory taking.

B. The Court Below Recognized That its Deferential Approach to the Substantial Advancement Issue Conflicts with This Court's Mandate of Heightened Judicial Scrutiny but Chose to Follow Conflicting State Court Precedent

The decision of the court below to reject this Court's mandate of heightened scrutiny was fully informed, the issue having been briefed by the parties and addressed in oral argument. As the court of appeal put it,

> Berger urges us to subject the Ordinance to heightened scrutiny of *Dolan* [sic] . . . . [However], Berger has not been denied all use of its property. It may still operate a mobilehome park and will continue to receive rent at a rate it does not contend is not a fair return. Further, City is not trying to exact money as a condition for the granting of any permit. Finally, it is not contended City is claiming any inherent right to deny Berger the right to engage in the rental of mobilehome spaces as justification for rent control. . . . Accordingly, we conclude the Ordinance need not be subject to a heightened *Dolan*-style level of scrutiny.[50]

None of the considerations cited in this passage, of course, have any bearing at all on this Court's mandate to employ heightened scrutiny in evaluating the "substantial advancement" test for regulatory takings. Nevertheless, the court below chose to rely on two decisions of the California Supreme Court in ruling that this case should be governed by a "reasonably necessary" standard of review--which, as noted above, turned out to be an

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[50] App. A-13-15.

abjectly deferential variant of the "minimal rational basis" standard.[51]

C. The Opinion Below Reflects a Systemic Conflict Between the State Courts of California and New York on the Appropriate Level of Scrutiny in Regulatory Takings Cases Brought Under the Fifth Amendment

In addition to conflicting with the Ninth Circuit Court of Appeals on the substantive issue of takings liability, the decision below directly conflicts with the highest state court of New York on the issue of the appropriate standard of review in Fifth Amendment takings cases. This is not an isolated or random inconsistency in the state cases but rather illustrates a fundamental conflict between the approach taken in the courts of the two largest states on a fundamental question of federal constitutional law.

In regulatory takings challenges to rental property regulations, the New York Court of Appeals has twice applied a heightened standard of review to strike down such measures for failing to substantially advance their stated objectives. In doing so, the New York court has expressly relied on this Court's holdings in *Nollan* and *Dolan*--the very cases rejected by the court below as inapplicable to regulations of this sort.

In *Seawall Associates v. City of New York*, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989), the highest New York court overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter*

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[51] App. A-15 (relying on *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997), and *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006 (1998)).

alia, Local Law 9 violated the Takings Clause by failing to substantially advance its admittedly legitimate objectives.

Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, the court of appeals struck down the regulations because "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural."[52] In arriving at this conclusion, the New York court recognized that

> the "close nexus" test . . . requires "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.[53]

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994). In striking down a rent control measure under the Takings Clause, the New York panel observed that *Nollan* and *Dolan* "establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause."[54] Applying the heightened scrutiny required by this Court, the court of appeals found that the challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*.[55]

The reasoning employed by the New York Court of Appeals applies equally to the case at bar. No close relationship

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[52] 542 N.E.2d at 1069.

[53] *Id.* at 1068.

[54] 618 N.Y.S.2d at 860.

[55] *Id.* at 858.

has been shown between maintaining the value of a one-time wealth transfer to a small number of politically favored individuals and the problem of preserving affordable mobile home housing in Escondido. The only nexus that appears from the record is the one identified by the court below: controlling rents in the Town and Country bears an unmistakable nexus to the City's desire to control rents.[56] This tautology, however, falls far short of the requirements of *Nollan* and *Dolan*.

By adopting a stance of virtually total deference to the enactments of local regulators, the court below has come into direct conflict with the rigorous application of *Nollan* and *Dolan* mandated by this Court and employed by the New York Court of Appeals. This Court should grant certiorari in order to resolve this conflict between the two largest states in the nation on their interpretation of important federal questions arising under the Takings Clause.

CONCLUSION

The petition for a writ of certiorari should be GRANTED.

DATED: February, 1999.

Respectfully submitted,

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

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[56] App. A-19.

Filed 8/17/98*

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

H.N. & FRANCES C. BERGER FOUNDATION,

Plaintiff and Appellant,

v.

CITY OF ESCONDIDO et al.,

Defendants and Respondents.

D027377

(Super. Ct. No. N63317)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth G. Ziebarth, Jr., Judge. (Retired judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed.

The H.N. & Frances C. Berger Foundation (Berger) appeals a judgment granting a motion for nonsuit by the City of Escondido (City) and dismissing Berger's inverse condemnation action. Berger contends the trial court erred in holding it failed to state a claim because it stipulated City's rent control ordinance (Escondido Municipal Code § 29-101 et seq. (the Ordinance)) as applied did not deprive it of "substantially all economically viable use of its property" even though it pled facts sufficient to establish the Ordinance did not substantially

* This unpublished disposition contains a number of typographical and other errors which are reproduced verbatim in this Appendix as they appear in the original.

advance a legitimate governmental interest. We recognize Berger need not be deprived of all use of its property to be entitled to compensation. However, we conclude well established precedent would allow Berger's claim to proceed as pled only in a narrow class of land use cases to which it does not belong and Berger may obtain an adequate remedy for any loss by other means. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

City voters approved Proposition K which enacted the Ordinance in 1988. A few months later, Berger became the owner of the Town and Country Mobilehome Park (Town and Country) through a series of gift transfers.[1]

On December 11, 1991, Berger applied to City Mobilehome Park Rental Review Board[2] (the Board) for a $69.70 rent increase[3] at the Town and Country. Berger justified its request

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[1] The Ordinance's history and the efforts by Berger and other mobilehome park owners to invalidate it are well documented in cases from this court and a decision of the United States Supreme Court which upholds the Ordinance's validity. (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, affirmed (1992) 503 U.S. 519 (*Yee I*); *Yee v. Mobilehome Park Rental Review Board* (1993) 17 Cal.App.4th 1097 (*Yee II*).) Berger's facial challenge was consolidated with those of several other park owners and was dismissed after the final decision in *Yee I*. Berger also filed an action in federal court which was dismissed as *res judicata* after the decision in *Yee I*.

[2] The Mobilehome Park Rental Review Board is comprised of the elected members of the City Council.

[3] All rent increase figures refer to the rent per mobilehome space per month unless otherwise specified.

based on six factors specified in the Ordinance.[4] On August 11, 1993, the Board held a public hearing where it received a staff report and heard testimony by Berger's representatives and tenants. The Board then closed the public portion of the hearing and directed its staff to prepare a rate of return analysis to supplement the record. Berger was requested to and did supply financial data to the staff over the next few weeks. The staff issued a supplemental report which detailed several methods for determining rate of return and the results obtained for the Town and Country. The results were mixed, with three methods supporting no increase, two methods supporting increases of over $35 per month and three methods being inconclusive.

The Board's management analyst formally presented the report at a meeting held on November 10, 1993. She told the Board the rate of return analysis had been prepared by an outside consultant. Berger's attorney attempted to augment the record, but the Board denied his request. After deliberation, the Board approved a $10 per month rent increase.

Berger filed its action in early 1994 seeking a writ of mandate to set aside the Board's action and complaints for declaratory relief, injunctive relief and inverse condemnation. In the inverse condemnation pleading, Berger alleged it had been deprived of "one of the most essential attributes of ownership of

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[4] The six factors Berger relied upon were: the increase in the Consumer Price Index (CPI) since 1986; rents in comparable mobile home parks in City; the length of time since the last rent increase; increases in property taxes; increases in operating and maintenance expenses; and the amount and quality of services provided. There are five additional factors specifically listed in the Ordinance including: completion and cost of capital improvements; changes in rent paid by the park operator; changes in utility charges paid by the park operator; the need for repairs caused by other than ordinary wear and tear; and any existing leases entered into between the operator and the affected tenant. In addition, the Board shall consider any other factors it considers relevant.

the Town and Country, *i.e.*, the right to determine the terms upon which possession of Petitioner's real property will be alienated." City's demurrer to the declaratory relief complaint was sustained, and its motion to have the administrative mandamus action heard first was granted. The court later ordered the Board to allow Berger's attorney to augment the administrative record.

Rather than augment the record, the Board held new hearings. At the new hearings, the Board received two new rate of return analyses prepared by outside consultants, one of which resulted indicated Berger should receive a rent increase of between $10 and $16.12. The Board granted Berger a $16.12 per month increase with an additional $6.40 for 17 months covering the time between the first and second hearings. Following the Board's new decision, the court denied Berger's petition and dismissed its complaint for injunctive relief as moot, leaving only the claim for inverse condemnation.

Before trial, Berger discovered the original rate of return analysis had not been prepared by an outside consultant as the Board's management analyst had testified, but by the analyst herself and another staff member. City and Berger stipulated as to the report:

> "The rate of return analysis presented by [management analyst] at the November 10, 1993, meeting of the Mobilehome Rent Review Board was prepared entirely by [management analyst] and [staff member]. Their analysis was based on legal advice from Donald R. Lincoln and Jeffrey Epp and information contained in the Berger Foundation's rent increase application and the administrative record."

The parties also stipulated on the economic issues in the case:

"1. The market value of the Town and Country Club Park under the Rent Ordinance is less than it would be in the absence of the Rent Ordinance.

"2. But for defendants' application of the Rent Ordinance, the Berger Foundation would have implemented rent increases at the Town and Country averaging more than $10.00 per space in December, 1991.

"3. For purposes of case no. N63317, the Berger Foundation does not contend that it has been denied a 'fair return' on the Town and Country.

"4. For purposes of case no. N63317, the Berger Foundation does not contend that it has been denied 'substantially all economically viable use of its land.'"

In its opening statement, Berger indicated it would prove the following facts: First, the Board recognized an increase in rents adjusted up by 75% of the CPI from the Ordinance's start date to the date of application would have justified an increase of $47.16 per month, and the $10.00 increase actually approved amounted to a 20% reduction in rents in real terms from the start date in 1986, while property taxes increased by 159% and operating expenses increased by 50% during the same period. This meant the rate of return analysis was the only factor which could have justified the $10.00 increase.

Second, the rate of return report on which the Board originally relied was prepared by the management analyst out of a "sense of urgency" even though she had never prepared such a report before and was unqualified to do so. Further, she lied when she told the Board the report was prepared by an outside consultant in order to provide the Board with an excuse for justifying the $10.00 increase.

Third, rent control caused the prices of existing mobilehome coaches located in parks to increase in value, actually increasing rather than decreasing the cost of housing. The price increase inured solely to the benefit of the owners at the time the

Ordinance went into effect, who would liquidate this benefit at the time they sold their coaches. Also, there had been a drastic reduction in the shipments of new coaches into California. Thus, the Ordinance was not achieving its stated purpose to reduce housing costs and increase availability of affordable housing while simultaneously making a one time wealth transfer to a politically favored group.

Finally, City's true purpose in enacting rent control was to further its scheme to acquire mobilehome parks at prices well below their market value under threat of condemnation. Thus, City would be achieving its purpose to "help citizens living in mobilehomes on fixed incomes" by shifting the cost of such help from itself to the park owners, until they were forced to sell the parks to City at depressed prices.

At the conclusion of Berger's opening statement, the court granted City's motion for nonsuit, holding Berger failed to state a claim for inverse condemnation once it stipulated it was not contending City's actions had deprived it of a fair return or substantially all viable use of its property. Further, the court held the case was not one subject to a heightened scrutiny.

DISCUSSION

Because this appeal is from a judgment of nonsuit, we must accept all of Berger's evidence as true, indulge in every favorable inference which can be drawn on its behalf and disregard all conflicting evidence. (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 857; *Harris v. Smith* (1984) 157 Cal.App.3d 100, 104.) This means "the appellate court must view the evidence as though judgment had gone in favor of [Berger], and order a reversal if such a judgment can be sustained." (*Raber v. Tumin* (1951) 36 Cal.2d 654, 656.) Additionally, to affirm a nonsuit after plaintiff's opening statement, we must assume Berger could not prevail even if it proved the facts presented in its opening statement. (*Loral*

Corp. v. Moyes (1985) 174 Cal.App.3d 268, 272; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 965-966.)

I

APPLYING THE AGINS TEST

A. In General

The government cannot take private property for public use without just compensation. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19.) However, the government may regulate the uses to which an owner may devote his or her property (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 397), although a regulation which "goes too far" may effect a taking for which the owner must be compensated (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415). The inquiry as to when a regulation has gone too far is necessarily one of fact. (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) A general test has emerged for review of restrictions imposed by government action which fall short of depriving an owner legal title to his or her land. A land use regulation, such as a zoning law, may, as applied to a particular piece of property, "effect[] a taking if [it] does not substantially advance legitimate state interests, [citation] or denies an owner economically viable use of his land." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.)[5]

There are, however, two broad categories of cases in which a compensable taking is recognized without resort to a detailed factual economic inquiry or strict observance of the *Agins* test. The first category includes cases where the owner's right to exclude others is compromised. When the government, either directly or indirectly, forces owners to suffer a physical occupation of their property there is a taking regardless of the magnitude of the occupation. (*Loretto v. Teleprompter*

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[5] This test can be conceptualized as consisting of two "prongs." For convenience, we refer to the first as the "government interest" prong, and the second the "economic" prong.

Manhattan CATV Corp. (1982) 458 U.S. 419, 430.) When a regulation forces an owner to provide access to the public as a condition for a building permit, such exaction is the functional equivalent of a physical occupation because it takes away the owner's right to exclude persons. (*Nollan v. California Coastal Comm'n.* (1987) 483 U.S. 825, 836-837; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 393.) California has extended this principle to situations where the government exacts a fee from a landowner as a substitute for providing access. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 883-884.) In these cases, the recognition of the property value of the right to exclude goes without serious question.

The second category includes cases where owners have been deprived of all economically beneficial uses of land where such denial is not within the government's police power to prohibit activities contrary to the public welfare. Laudable public purposes do not excuse the responsibility to pay for such deprivations. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, 1022.) The holding in *Lucas* left open the possibility that a loss not amounting to deprivation may also satisfy the requirements for a taking regardless of the asserted governmental interest. (*Id.* at p. 1019, fn. 8.)

By established precedent, the Ordinance does not amount to either an actual or a constructive physical occupation of the park owner's land. (*Yee v. City of Escondido, supra,* 503 U.S. at p. 531.) Also, Berger's stipulation is not contending a deprivation of greater than or equal to "substantially all" economically viable use, necessarily forecloses a finding it was denied all economically viable use. Therefore, this case does not fit within either of the above described "categorical" takings, and is subject to the *Agins* test.

B. Conjunctive Versus Disjunctive Construction

Berger contends the court below and this court in the past have misconstrued the *Agins* test in the conjunctive rather than

the disjunctive (in other words, we substituted an "and" between the two prongs of the test for the "or" appearing in *Agins*). (*Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1079.) It urges us to reconsider our decision in *Del Oro Hills* in light of later federal authority (see *Del Monte Dunes at Monterey v. City of Monterey* (9th Cir. 1996) 95 F.3d 1422, 1428, 1430), and a recent rent control decision by our Supreme Court (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774). It further contends if we were to apply the test from *Del Oro Hills*, the results in *Nollan*, *Dolan* and *Lucas* would have been different, demonstrating the fallacy in applying the test in the conjunctive. We do not reject Berger's argument; however, it is unnecessary to reach the issue of construction because we conclude Berger fails to establish a claim under either prong.

II

THE ECONOMIC PRONG

A. Substantially All Economically Viable Use

Berger correctly contends there has never been a United States Supreme Court case which has held a taking must deprive an owner of "substantially all economically viable use" of his or her property. Nevertheless, we are convinced the term expresses a view consistent with takings jurisprudence and which provides a reasonable guide to evaluating regulatory deprivations of less than all use of property.

In its ruling in *Agins*, the California Supreme Court held a zoning ordinance was constitutional unless it deprived the owner of "substantially all reasonable use of his property." (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277.) Because the United States Supreme Court found the question of taking was not close, it expressed no opinion on the above language. (*Agins v. Tiburon, supra*, 447 U.S. at p. 262.) Our Supreme Court now recognizes its characterization as dictum (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 769), and has

clearly stated, "[a] regulation, however, may effect a taking though, as is true here, it does not involve a physical invasion and leaves the property owner some economically beneficial use of his property." (*Id.* at p. 774.)

The earliest use of the precise term "substantially all economically viable use" in the context of a takings claim appears to come from the Ninth Circuit. (*Herrington v. Sonoma County* (9th Cir. 1987) 834 F.2d 1488, 1497.) The *Herrington* court presumably found the term implied in Supreme Court rulings in which a temporary loss of all use was found to be "substantial" (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 318), and an aggrieved landowner must establish a regulation has "in substance 'taken' his property" (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348). The term has since been adopted with reference to *Herrington* by the Seventh Circuit (*Estate of Himelstein v. City of Fort Wayne, Ind.* (7th Cir. 1990) 898 F.2d 573, 576-577, fn. 4), and by the United States Court of Claims with reference to *First Lutheran* (*Dufau v. United States* (1990) 22 Cl.Ct. 156, 163). It has been implicitly recognized as a valid standard by the Federal Circuit. (*Tabb Lakes, Ltd. v. United States* (Fed. Cir. 1993) 10 F.3d 796, 799, 802.)

The first use of the term in a California case occurred in 1992 in a mobilehome park rent control case from the Second District, which specifically used the term in the context of the *Agins* test. (*Sandpiper Mobile Village v. City of Carpenteria* (1992) 10 Cal.App.4th 542, 550.) It was soon adopted by this court. (*Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd.* (1994) 30 Cal.App.4th 84, 95.) We have adhered to its use in several later opinions. (*Del Oro Hills v. City of Oceanside, supra*, 31 Cal.App.4th at pp. 1079-1080; *Thomsen v. City of Escondido* (1996) 49 Cal.App.4th 884, 893; *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal. App.4th 1409.)

However the term is characterized, the fundamental meaning must of course be consonant with and faithful to established takings jurisprudence. We seek to define when a regulation "goes too far," and crosses the line at which a private party is being forced to bear "public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49; *Pennsylvania Coal Co. v. Mahon, supra*, 260 U.S. at p. 415.)

While we recognize we must rely "'as much [on] the exercise of judgment as [on] the application of logic'" (*MacDonald, Sommer & Frates v. Yolo County, supra*, 477 U.S. at p. 349, quoting *Andrus v. Allard* (1979) 444 U.S. 51, 65), we can neither ignore precedent, nor embark on an undirected analysis as if each takings case bears no resemblance to those which have gone before. Certainly, if the Ordinance took "all economically viable use" from Berger, there would have been a compensable taking. (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S. at p. 1020.) It is also clear that Berger may retain "some use" of the property and still receive compensation. (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 774.) Whatever remains for Berger, if there is to be a taking substance" (*MacDonald, Sommer & Frates v. Yolo County, supra*, 477 U.S. at p. 348), the deprivation must be "substantial." Thus, we believe the term "substantially all economically viable use" provides a reasonably reliable measuring device in a regulatory takings case. Consequently, because Berger does not contend it has been denied that which we conclude to be the proper minimum measure of loss to establish a regulatory taking, and its contention cannot be logically construed to imply a denial of all economically viable use, it has failed to meet the economic prong of the *Agins* test.

B. Fair Return Analysis

Berger contends the trial court's reliance on its stipulation it was not contending it was denied a "fair return" as a basis for dismissing its suit is based on a "legal fantasy," because the

Ordinance does not list fair return as a factor for the Board's consideration and the fair return analysis should be applied only to public utilities, not private landlords. While we have some reservation about the court's belief the two prongs of the *Agins* test are "synthesized" into a fair return analysis, we nonetheless find fair return to be a relevant consideration in rent control cases generally, and to this case.

Berger is correct the Ordinance does not specifically require the Board to consider rate of return in its decisions, but the fact the Board directed its staff to prepare a rate of return analysis clearly indicates it believed rate of return to be relevant. (See *ante*, fn. 3.) We find no evidence in the record to indicate this was not a proper exercise of the Board's discretion.

We also find considerable support for the inclusion of fair return analysis in regulatory takings cases, including rent control. While the analysis in *Yee I* was confined to whether the Ordinance substantially advanced legitimate state interests, it was done so in the context of deciding whether the Ordinance effected a physical taking. (*Yee v. City of Escondido, supra*, 503 U.S. at pp. 530-531.) Contrary to Berger's contention, rate of return analysis is not limited to public utility cases. Application of fair return analysis in rent control predates *Yee I*. The United States Supreme Court "recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. [Citations.] . . . Within this scheme, [the Ordinance] represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed *a fair return on their investment*." (*Pennell v. San Jose* (1988) 485 U.S. 1, 13, italics added.)

California has long recognized the importance of rate of return analysis in rent control cases. (*Birkenfield v. City of Berkeley* (1976) 17 Cal.3d 129, 165.) Recently, the California Supreme Court reiterated: "In the context of price control, which includes rent control, courts generally find that a regula-

tion bears 'a reasonable relation to a proper legislative purpose' so long as the law does not deprive investors a 'fair return' and thereby become 'confiscatory.' [Citation.]" (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 771.)

We reject, however, the trial court's assertion the *Agins* test becomes somehow "synthesized" into a single question whether the Ordinance provides the park owner a fair return. While City cites cases for the proposition a diminution in value does not alone establish a taking (see *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686), or that a fair rate of return may negate a finding a taking has occurred (*Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd., supra*, 30 Cal. App.4th at p. 95; *Yee v. City of Escondido, supra*, 224 Cal. App.3d at pp. 1353-1354), in each the government interest prong was satisfied. Also, while we recognize a taking case differs from a pure Due Process case by focusing on the return rather than the process used in making the determination (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 776), the fair return inquiry is not an end in itself; it is merely the precursor to the question whether Berger was denied substantially all economically viable use of its property. Thus, because the court here did resolve the ultimate inquiry, we find any error in its perception of the *Agins* test was harmless.

III

THE GOVERNMENT INTEREST PRONG

A. The Proper Level of Scrutiny

Berger urges us to subject the Ordinance to heightened scrutiny of *Dolan* in light of our Supreme Court's decision in *Ehrlich*. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 876.) We agree a monetary exaction which may amount to "out-and-out [plan of] extortion" (*Nollan v. California Coastal Comm'n., supra*, 483 U.S. at p. 837) or a regulation which deprives an owner "all economically viable use" of its land (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S.

at p. 1020) may require a reviewing court to subject such governmental action to higher than mere "rational basis" scrutiny. However, the California Supreme Court in *Ehrlich* declared:

> "[A]lthough we conclude that the combined test of *Nollan* and *Dolan* applies to the monetary exaction imposed by Culver City in this case, we also conclude that the heightened standard of scrutiny is triggered by a relatively narrow class of land use cases--those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* is, after all, a conventional regulatory takings case. Rather, as the court's rationale for its result in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development permit which, but for the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 868.)

As we have stated *ante*, this case simply does not fit into the "narrow range of cases" defined in *Ehrlich*. First, Berger has not been denied all use of its property. It may still operate a mobilehome park and will continue to receive rent at a rate it does not contend is not a fair return. Further, City is not trying to exact money as a condition for the granting of any permit. Finally, it is not contended City is claiming any inherent right to deny Berger the right to engage in the rental of mobilehome spaces as justification for rent control. Indeed, in the absence of some extraordinary circumstances not present here, we doubt City could.

We are also persuaded by the decision in *Kavanau*, itself a rent control case:

> "When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the 'factors' the high court discussed in *Penn Central* [*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104] and subsequent cases. [Citations.] . . . 'the nature of the State's interest in the regulation' [citations] . . . and, particularly, whether the regulation is 'reasonably necessary to the effectuation of a substantial public purpose' [citation]." (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 775.)

We believe the above statement stands as the last best enunciation of the proper level of scrutiny in rent control takings cases. Accordingly, we conclude the Ordinance need not be subject to a heightened *Dolan*-style level of scrutiny.

B. Evaluation under a "Reasonably Necessary" Standard of Review

When a rent control or other regulatory agency makes a quasi-adjudicative decision, "It]he proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1022.) Thus, the proper role of this court is to look at the findings of the Board to determine whether they were based on substantial evidence. (*Ibid.*; Code Civ. Proc., § 1094.5; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.)

We note at the outset the United States Supreme Court has accepted the general validity of rent control as advancing a legitimate governmental purpose in much the same way as rate regulation. (*Pennell v. San Jose, supra*, 485 U.S. at pp. 12-13.)

Thus, there is a strong presumption in favor of the Ordinance's validity.

1. One Time Wealth Transfer

Berger contends its claim the continued application of the Ordinance resulted in a "one time wealth transfer to a politically favored group," raises the cost of housing rather than lowering it, in contravention of the stated goals of rent control. Further, it contends it is an "as applied" challenge to the Ordinance.

As to Berger's first point, we accept it may be able to prove such a "wealth transfer" does in fact occur and this fact "might have some bearing on whether the ordinance causes a regulatory taking. . . ." (*Yee v. City of Escondido, supra*, 503 U.S. at p. 530.) However, if such a claim is to be made in the context of an "as applied" taking, the focus would not be on whether the wealth transfer exists, but rather whether the rent increases provide a return sufficient to ameliorate the effects of this premium. (*Levald, Inc. v. City of Palm Desert* (9th Cir. 1993) 998 F.2d 680, 689.) Because Berger stipulates it does not contend it has been denied a fair return, we are unable to discern how such a wealth-transfer claim would inure to the benefit of its case.

Berger's other point is made in apparent recognition its claim must be an as applied challenge to the Ordinance, as a facial challenge would be subject to *res judicata* (see *Yee v. City of Escondido, supra*, 503 U.S. at p. 538), or fail for lack of standing or ripeness (see *Levald, Inc. v. City of Palm Desert, supra*, 998 F.2d at p. 689).

Two federal courts have rejected the notion a claim such as Berger's is an "as applied" challenge. (*Levald, Inc. v. City of Palm Desert, supra*, 998 F.2d at p. 689; *Carson Harbor Village Ltd. v. City of Carson* (9th Cir. 1994) 37 F.3d 468, 474, fn. 5, overruled on other grounds in *WMX Technologies, Inc. v. Miller* (9th Cir. 1997) 104 F.3d 1133, 1136.) A "facial" challenge arises solely from the existence of the Ordinance itself. (*Levald,*

Inc. v. City of Palm Desert, supra, 998 F.2d at p. 689.) Presumably, if the Ordinance were repealed, any "wealth transfer" would soon evaporate. We therefore conclude Berger's contention does indeed amount to a "facial" challenge, and is inappropriate for our consideration in this case.

2. City's "Scheme"

Berger forcefully contends it can establish the existence of a "scheme" by the Board to drive down the value of its property through the use of the Ordinance, and acquire the property which the City would then operate and subsidize the rents charged. As indicated *ante*, we are bound to accept the facts Berger alleges in its pleadings and opening statement. We briefly summarize them.

Before the enactment of the Ordinance, a memorandum favoring acquisition of mobilehome parks by condemnation had circulated within City administration. City also considered offering direct subsidies to mobilehome park residents. Later, it developed a "new, aggressive park acquisition policy" in which it would continue to operate the parks and use the rents collected to service the debt incurred in the purchases. A lone member of the Board directed City staff to investigate "mass acquisitions" of parks, and appraisals of one park calculated its value with and without rent control. The appraiser reported an owner "under duress" might sell at below appraised value. Later, City did purchase two parks for a total of $2 million below their appraised pre-rent control values. The purchase and sale agreements indicated the transactions took place "in lieu of the City's initiation of condemnation proceedings under its power of eminent domain."

Certainly, when the facts reasonably indicate an inappropriate motive has become an implemented policy which is clearly dictating action, we are bound to find the application of even a facially valid regulation no longer passes even the most relaxed scrutiny. (*Klopping v. City of Whittier* (1972) 8 Cal.3d

39, 46.) However, *Klopping* involved a clearly public pre-condemnation announcement which was directed at and led to the decline in the value of plaintiff's property and amounted to a "de facto taking." (*Id.* at p. 44.) Such de facto takings occur when there is a "physical invasion or direct legal restraint." (*Id.* at p. 46.) Likewise, where a zoning board has enacted a particularly harsh zoning regulation often calculatingly designed to decrease any future condemnation award, the government action cannot be considered reasonable, such as zoning a parcel located near a proposed airport runway to accommodate structures no higher than zero feet. (*Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, 848.) Airport height restrictions, however, have long been construed as creating an airspace easement on the property. (*United States v. Causby* (1946) 328 U.S. 256, 261-262.)

We admit the facts suggest the possibility one or more individual members of the Board may have considered things which, if they had become part of a clearly established and identifiable Board policy, could give rise to the strong inference the rent increases did not substantially advance the purposes of the Ordinance. Nonetheless, we are required to evaluate the facts in light of the presumption of validity to which the Board's action is entitled. (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 773; *Coleman v. Paccarr Inc.* (1976) 424 U.S. 1301, 1306.) Further, the mere existence of a motive held by some members of a legislative body does not in and of itself suggest an improper purpose, has been adopted by the body as a whole. "The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." (*Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 488.) Further, "[a] government may, absent extraordinary delay or deprivation of use of the land, engage in good faith planning activities and decisionmaking concerning the potential public use of a site (i.e., designate the

property as a site to be studied for possible public acquisition, designate a site for public purposes in a general plan, or commence eminent domain proceedings which are then abandoned), without being subject to an inverse condemnation action, even if the value of the land fluctuates during the process." (*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3rd 1201, 1220.) Thus, even though we acknowledge there are those in City government who spoke favorably of the "scheme" of which Berger complains, we conclude Berger's evidence would not show the Board's actions were improper.

Recently, in *Landgate, Inc. v. California Coastal Com., supra*, 17 Cal.4th at page 1022, the Supreme Court rejected a similar argument when receiving a development permit denial by the Coastal Commission claimed to be the outgrowth of a "jurisdictional spat" between the Commission and the County of Los Angeles. Noting the Commission's findings clearly articulated legitimate reasons for the denial, the Court concluded: "[W]e must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit." (*Id.* at p. 1022.)

Here, there is no doubt the Board's decision substantially advances the purpose of the Ordinance. Berger sought a rent increase of nearly $70, and the Board approved $16.12. The tenants at the Town and Country, especially those living on fixed incomes, were certainly benefited by such a limitation on rent increases on their spaces. The rent increase ultimately approved by the Board fell within the range of increases called for by its analytical methods, and was in fact at the high end of one of them. We therefore conclude the Board's decision was supported by substantial evidence and satisfies the government interest prong.

3. Subsumed Due Process

Berger lastly contends the court below accepted its theory of the case because it held the allegations of a "scheme" arguably stated a claim for due process, and such a cause of action would be subsumed into a takings case. Berger relies on a recent federal case to support its theory of subsumption. (*Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, 1326.) We reject this contention. In *Armendariz*, the property owners' buildings were shut down and they were eventually forced to surrender title to the local government. The question of a taking was never in doubt. (*Id.* at pp. 1314-1315.) We find nothing to indicate *Armendariz* should be extended to a regulatory takings case. (See *Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at pp. 771-774.)

DISPOSITION

The judgment is affirmed.

WORK, Acting P.J.

I CONCUR:

HALLER, J.

BENKE, J. concurring.

I join in the conclusion of the majority affirming the decision of the trial court granting the City of Escondido's (City) motion for nonsuit. I do so, however, on the more limited ground that in stipulating the cause of action for administrative mandamus be dismissed, the parties ended H. N. & Frances C. Berger Foundation's (Berger) inverse condemnation claim as well.

Berger's opening brief contains the following statement: "On May 10, 1995, rather than augmenting the record as ordered by the court and proceeding to a writ hearing, the Rent Board vacated its decision of November 10, 1993, and conducted new hearings, ultimately concluding that a larger rent increase was

required to provide a fair return on the Town and Country. This action by the Board fully granted the relief sought by [Berger's] petition for administrative mandamus." (Fn. omitted.) According to Berger's brief, the parties then stipulated that the cause of action for administrative mandamus could be dismissed.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19, the court held that when an inverse condemnation claim is based on an allegation there has been a regulatory taking, the claimant must first challenge the regulation administratively, including prosecuting an administrative mandamus action, before pursuing a claim for damages. Having apparently determined that there is no valid basis to challenge the city's final resolution of its application for a rent increase, Berger cannot maintain a claim for damages on the basis of that decision.

Even if we ignore the bar *Hensler* presents, Berger's claim fails under *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 779-786, which holds that in the rent control setting, damages for inverse condemnation are not available because, even if a landlord can show that past controls were confiscatory, the rent regulatory body can remedy any temporary loss by granting future rent increases.

In light of my analysis I see no need to engage, as the majority does, in any extended discussion or application of *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277. The test promulgated there respecting whether a taking must deprive an owner of "substantially all reasonable use of his property" (*ibid.*) has been repudiated in *Kavanau v. Santa Monica Rent Control Bd., supra,* 16 Cal.4th at page 769. Contrary to the majority's view, the Supreme Court in *Kavanau* did not relegate this test to dicta, free to be picked up again at the discretion of this court. Rather, the Supreme Court expressly concluded the test it had used in *Agins* was based upon a misinterpretation of federal constitutional requirements. (*Id.* at pp. 774-775.)

I do not believe we are in a position to quarrel with the high court's analysis of its own opinion.

BENKE, J.

Appendix B-1

Filed 11/24/98

Fourth Appellate District, Division One, No. D027377

S073664

IN THE SUPREME COURT OF CALIFORNIA

H.N. & FRANCES C. BERGER FOUNDATION, Appellant

v.

CITY OF ESCONDIDO Et Al., Respondents

Petition for review DENIED.

Baxter, J., Chin, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

Appendix C-1

Filed 8/30/96

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

H.N. and FRANCES C. BERGER FOUNDATION,	)	Case No. N63317
	)	JUDGMENT
Petitioner/Plaintiff,	)	
v.	)	
CITY OF ESCONDIDO, et al.,	)	
Respondents/Defendants.	)	

The above-entitled cause came on regularly for trial on June 13, 1996 in Department M of the above-entitled Court, the Honorable Kenneth G. Ziebarth, Jr. presiding without a jury, and was heard on that date and on June 17, 1996.

R.S. Radford, Ronald St. John, and Mark Gallagher appeared as counsel for Petitioner/Plaintiff H.N. and Frances C. Berger Foundation ("Berger"), and Donald R. Lincoln, James C. Allen, and Linda Reich appeared as counsel for Respondents/Defendants City of Escondido, et al.[1]

---

[1] Respondents/Defendants also included Jerry Harmon, Sid Hollins, Richard A. Foster, Lori Holt Pfeiler, and Elmer Cameron, sued individually and as members of the City of Escondido's Mobilehome Rental Review Board. The Respondents/Defendants are hereinafter collectively referred to as "City."

Appendix C-2

On June 17, 1996 Berger made its Opening Statement. Thereafter City moved for a Judgment of Nonsuit.

The Court, heard and considered Berger's Opening Statement, Berger's and City's Amended Trial Briefs, City's Motion for Nonsuit and Berger's Opposition, the Stipulations entered into by the parties on April 8, 1996 and filed on June 10, 1996 the pleadings and record in this case, and the arguments of counsel.

The matter having been submitted for decision and the Court having previously dismissed all of Petitioner/Plaintiff Berger's causes of action except its claim for inverse condemnation and having issued its Statement of Decision, on August 19, 1996,

IT IS ADJUDGED THAT:

1. Respondents/Defendants City, et al.'s Motion for Nonsuit is granted;

2. Respondents/Defendants City, et al. recover Judgment against Petitioner/Plaintiff Berger;

3. Petitioner/Plaintiff Berger recover nothing from Respondents/Defendants City, et al.

4. Respondents/Defendants City et al. recover against Petitioner/Plaintiff Berger their costs in the amount of $___.

DATED: Aug 30 1996

/s/ KENNETH G. ZIEBARTH
HONORABLE KENNETH G. ZIEBARTH JR.
Judge of the Superior Court, Retired

Appendix C-3

Approved as to Form:

/s/ R. S. RADFORD
R.S. Radford
Ronald St. John
Mark Gallagher
Attorneys for Petitioner/Plaintiff
H.N. & Frances C. Berger Foundation

/s/ DONALD LINCOLN
Donald R. Lincoln
Linda B. Reich
James C. Allen
Attorneys for Respondents/Defendants
City of Escondido, et al.

Filed 8/19/96

SUPERIOR COURT

OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

NORTH COUNTY BRANCH

H.N. AND FRANCES C. BERGER FOUNDATION	)	Case No. N63317
	)	
	)	STATEMENT OF
Petitioner/Plaintiff,	)	DECISION RE CITY'S
v.	)	MOTION FOR
	)	NONSUIT
CITY OF ESCONDIDO, et al.,	)	
	)	
Respondents/Defendants.	)	
	)	

The above-entitled cause came on regularly for trial on June 13, 1996 in Department M of the above-entitled Court, the Honorable Kenneth G. Ziebarth, Jr. presiding without a jury, and was heard on that date and on June 17, 1996.

R.S. Radford, Ronald St. John, and Mark Gallagher appeared as counsel for Petitioner/ Plaintiff H.N. and Frances C. Berger Foundation ("Berger"), and Donald R. Lincoln, James C. Allen, and Linda Reich appeared as counsel for Respondents/ Defendants City of Escondido, et al.[1] ("City").

On June 17, 1996, Berger made its Opening Statement. Thereafter, City moved for a Judgment of Nonsuit pursuant to

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[1] Respondents/Defendants also included Jerry Harmon, Sid Hollins, Richard A. Foster, Lori Holt Pfeiler, and Elmer Cameron, sued individually and as members of the City of Escondido's Mobilehome Rental Review Board. The Respondents/Defendants are hereinafter collectively referred to as "City."

Code of Civil Procedure §581c pointing out that Berger failed to state a cause of action for an "as applied" regulatory taking challenge to a mobilehome space rent control ordinance because it failed to allege that it was denied a "fair return" or that it was denied "substantially all economically viable use of its property."

The Court, having considered Berger's Opening Statement, Berger's and City's Amended Trial Briefs, City's Motion for Nonsuit and Berger's Opposition, the Stipulations entered into by the parties on April 8, 1996 and filed on June 10, 1996, the pleadings and record in this case, and the arguments of counsel, and being fully advised:

The Court hereby grants City's Motion for Nonsuit based on the grounds that the only remaining cause of action in this lawsuit is one for an "as applied" regulatory taking, and it is clear from Berger's Opening Statement and the Stipulations entered into by the parties that the facts Berger intended to prove at trial did not state facts sufficient to state a cause of action for an "as applied" regulatory taking challenge to a mobilehome space rent control ordinance.

Although a Statement of Decision is not required in connection with a Nonsuit, the Court, having in mind that this proceeding will undoubtedly be appealed and pursuant to the agreement of the parties to such a procedure, directed counsel for the City to draft a Proposed Statement of Decision which incorporates all of the findings of facts and conclusions of law made by this Court in arriving at the Decision indicated above. Counsel for the City has since prepared such a document and Counsel for Berger has been given the opportunity to file written objections to same and to suggest additional findings of fact and conclusions of law.

After reviewing and considering the contents of all of the subsequent documents, this Court hereby issues the following Statement of Decision in this case:

A. The Court bases its decision on the following facts:

Appendix D-3

1. On June 7, 1988, the voters of the City of Escondido passed Proposition K ("the Ordinance"), an initiative ordinance which established mobilehome park space rent regulation in the City of Escondido. The Ordinance has been codified at section 29-101, et seq., of the Escondido Municipal Code ("EMC").

2. The Ordinance designated the City Council as the Mobilehome Rental Review Board ("Board"). EMC, §29-102(a). Pursuant to the Ordinance, all mobilehome space rents were "rolled back" to a "base rent," the rent in effect for the space on January 1, 1986. EMC, §29-103. To increase the rent, a park owner must obtain Board approval. EMC, §29-104(a). The Board must approve rent increases that are just, fair and reasonable, and must consider eleven listed factors and may consider any other factors it considers relevant. EMC, §29-104(g).

3. When the Ordinance was enacted, the property in question, the Town & Country Club Mobilehome Park ("Park"), was owned by Fairfield Homes, Inc. Berger first acquired ownership of the Park in December 1988.

4. On May 31, 1989, Berger filed a Complaint (*H.N. and Frances C. Berger Foundation v. City of Escondido*, San Diego Superior Court, N43874) for inverse condemnation and injunctive relief and damages. It alleges that the Ordinance constituted a "taking" of its property because it did not permit Berger to automatically raise space rents when a mobilehome was sold or transferred. As a second cause of action, it alleged that the Ordinance was unconstitutional because no emergency existed to justify its imposition.

5. On August 15, 1989 the Hon. Robert J. O'Neill, Judge of the San Diego Superior Court, issued an Order Granting the City's Demurrer and dismissing the action.

6. On August 31, 1989, Berger filed a Notice of Appeal. *H.N. and Frances C. Berger Foundation v. City of Escondido*, 4th Civ. No. D010769. Subsequently the *Berger* appeal was

consolidated with eleven similar suits *sub nom. Yee v. City of Escondido*, 4th Civ. No. D010307. In the consolidation, all parties agree to be bound by the *Yee* decision.

7. On October 31, 1990, the Court of Appeal issued its decision affirming the lower court dismissals. *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990).

8. Yee's Petition for Review to the California Supreme Court was denied. See 224 Cal.App.3d at 1362.

9. The United States Supreme Court granted certiorari and on April 1, 1992 unanimously affirmed the Court of Appeal decision in *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992).

10. On February 1, 1991, approximately one week after the California Supreme Court had denied review in *Yee*, Berger filed a federal action (*H.N. and Frances C. Berger Foundation v. City of Escondido*, U.S. Dist. Ct., S.D. Cal. Case No. 91-0153 K (BTM)) which also contended that the Ordinance's lack of a vacancy decontrol provision constituted a "taking."

11. On June 12, 1991, the Honorable Rudi M. Brewster, United States District Judge, granted City's Motion to Dismiss, finding that Berger's federal action was barred by the res judicata effect of the prior decision in *Yee v. City of Escondido, supra*, 224 Cal.App.3d 1349.

12. On or about July 8, 1991, Berger filed a Notice of Appeal to the Ninth Circuit. Berger's appeal was consolidated with several other appeals, *sub nom. Vista Verde Limited, et al. v. City of Escondido*, 9th Cir. Docket No. 91-56101. On June 19, 1992 after the United States Supreme Court decision in *Yee*, that appeal was dismissed.

13. On December 11, 1991, Berger filed an application for a rent increase. Berger requested an average rent increase of $69.70 per space per month.

14. On November 10, 1993, the Board held a hearing and acted on Berger's application by granting a $10 per space per month rent increase.

15. On January 12, 1994, the Board issued a formal Resolution RRB 94-2 setting forth its findings in support of the $10 rent increase decision.

16. On February 7, 1994 Berger and Fairfield Homes, Inc. filed this action. After City demurred, on April 26, 1994, Berger filed an Amended Petition/Complaint in which Fairfield Homes, Inc. was no longer listed as a Petitioner/Plaintiff.

17. As a First Cause of Action, Berger sought a Writ of Administrative Mandamus pursuant to Code of Civil Procedure §1094.5 alleging that the Board's decision granting it a $10 rent increase was arbitrary and had denied Berger a fair return on its investment.

18. As a Second Cause Of Action, Berger alleged as follows:

SECOND CAUSE OF ACTION:
INVERSE CONDEMNATION

26. Petitioner realleges and incorporates by reference all allegations of Paragraphs 1 through 25 above.

27. As a direct and necessary result of respondents' application of the Rent Ordinance to the Town and Country, the Berger Foundation has suffered a regulatory taking of its private property for public use in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 19, of the California Constitution.

28. The effect of the Rent Ordinance as enacted and applied is to transfer certain discrete, valuable property interests from the Berger Foundation to individual coach owners who resided in the Town and Country at the time the Ordinance was enacted. The value of the property

interests at issue -- the right to occupy spaces in the Town and Country indefinitely while paying less than competitive market rents -- is converted into a cash premium and appropriated by residents of the Town and Country when these residents sell their mobile home coaches.

29. The application of the Rent Ordinance confers no comparable benefit to future park residents or to the population of Escondido as a whole. Indeed, by increasing the cash price of mobile home coaches sited in the Town and Country, the Rent Ordinance raises the cost of housing to all subsequent park residents. This result is directly contrary to the asserted purpose of the ordinance, preserving affordable mobile home housing.

30. The Rent Ordinance as enacted and applied has deprived the Berger Foundation of one of the most essential attributes of ownership of the Town and Country, *i.e.*, the right to determine the terms upon which possession of Petitioner's real property will be alienated.

31. The Rent Ordinance as applied to the Berger Foundation fails to substantially advance any legitimate governmental interest and in fact contravenes its own goals. The Rent Ordinance therefore constitutes a regulatory taking of the foundation's property for public use.

32. The Berger Foundation has received no compensation for the regulatory taking of its property, and the Rent Ordinance contains no provision for seeking or obtaining just compensation.

33. Petitioner does not have a plain, speedy, or adequate remedy in the ordinary course of the law other than the relief requested herein. Petitioner has exhausted all administrative remedies required by law; this action is ripe for adjudication and is timely filed.

19. As a Third Cause of Action Berger challenged the City's authority to regulate rents and sought declaratory relief that the Ordinance should not be applied to Berger.

20. As a Fourth Cause of Action, Berger sought injunctive relief to prevent City from enforcing the provisions of the Ordinance against Berger.

21. City demurred to all but the First (Writ of Administrative Mandamus) Cause of Action and, on June 29, 1994, the Court sustained City's Demurrer to the Third Cause of Action for Declaratory Relief without leave to amend but overruled City's Demurrers as to the Second and Fourth Causes of Action.

22. On July 14, 1994, City answered denying the primary allegations in the Petition/Complaint and raising various affirmative defenses.

23. On January 31, 1995, the Superior Court granted City's Motion that the First Cause of Action seeking a Writ of Administrative Mandamus challenging the $10 rent increase be heard prior to Berger's inverse claim.

24. On February 18, 1995, Berger filed a Petition for Writ of Mandate with the appellate court challenging that Order. On March 9, 1995, the Court of Appeal denied Berger's Writ and Request for Stay without opinion.

25. On March 7, 1995, the Superior Court issued an Order, which among other items, granted Berger's motion to augment the administrative record and "remand[ed] this matter to the Mobilehome Rent Control Board to hear this evidence."

26. In response to the remand Order, the Board decided to vacate its $10 rent decision and rehear the entire matter.

27. After hearings on May 10 and May 24, 1995, the Board granted Berger a $16.12 per month per space rent increase (or $6.12 more than its prior decision). In addition, after noting that there had been a 17-month delay between its

first and second decisions, the Board approved an additional $6.40 per month per space rent increase for the next 17 months.

28. On June 7, 1995, the Board formally approved its May 24, 1995, $16.12 and $6.40 rent decisions in Resolution No. RRB 95-2.

29. On June 21, 1995, the City filed its Response to the Court's March 7, 1995 Order inciuding a copy of Resolution No. RRB 95-2.

30. On or about June 28, 1995, Berger filed a Motion for Summary Adjudication of its First (Writ of Administrative Mandamus) Cause of Action.

31. On August 24, 1995, the Superior Court via telephonic ruling denied Berger's Motion, holding that "[b]ecause the Board had officially set aside its November 10, 1993 final determination, has conducted new hearings, and has reached a determination more favorable to Petitioner" the First Cause of Action for a Writ of Administrative Mandamus was "moot."

32. On November 9, 1995, the Court denied City's Motion for Judgment on the Pleadings as to the Second and Fourth Causes of Action and denied City's request for Summary Judgment or Adjudication as to the Second Cause of Action for inverse condemnation. The Court did, however, grant Summary Adjudication as to the Fourth Cause of Action, holding that because the injunctive relief requested was "adjunct" to the relief requested in the First (Writ) Cause of Action it was also "moot."

33. On February 5, 1996, the Court formally dismissed the First (Writ of Administrative Mandamus) and Third (Declaratory Relief) Causes of Action.

34. As a result of these rulings, the only cause of action remaining in this case was the Second Cause of Action for an "as applied" regulatory taking (inverse condemnation).

35. On April 8, 1996, the parties entered into the following stipulations:

> IT IS HEREBY AGREED AND STIPULATED among the parties to this action, by and through their attorneys of record, for purposes of trial in Case No. N63317, that:
>
> 1. The market value of the Town and Country Club Park under the Rent Ordinance is less than it would be in the absence of the Rent Ordinance.
>
> 2. But for defendants' application of the Rent Ordinance, the Berger Foundation would have implemented rent increases at the Town and Country averaging more than $10.00 per space in December, 1991.
>
> 3. For purposes of case No. N63317, the Berger Foundation does not contend that it has been denied a "fair return" on the Town and Country.
>
> 4. For purposes of case No. N63317, the Berger Foundation does not contend that it has been denied "substantially all economically viable use of its land."

36. On June 10, 1996, the above Stipulation was filed with the Court.

37. On June 10, 1996, City informed the Court that it intended to move for Nonsuit after Berger's Opening Statement and, at the Court's suggestion and without objection from Berger, City filed its Motion for Nonsuit, including a Memorandum of Points and Authorities.

38. On June 13, 1996, Berger filed its Opposition to City's Motion for Nonsuit and the parties engaged in preliminary oral argument.

39. On June 14, 1996, Berger filed citations to Additional Authorities in Opposition to Defendants' Motion for Nonsuit.

40. On June 17, 1996, Berger's counsel presented Berger's Opening Statement in the form of a 14-page written document, which it filed with the Court.

41. In its Opening Statement, Berger argued that the Ordinance as applied to its specific property did not substantially advance a legitimate governmental interest and therefore constituted a regulatory taking. Berger emphasized that this case did *not* involve the issue of whether or not it had received a "fair return" on its property but instead argued that it could establish a regulatory taking based solely on evidence that the Ordinance's application did not advance a legitimate state interest.

After contending that the Court must apply a "heightened standard of review" and pointing out that the Ordinance itself was "silent concerning the purposes it is intended to advance," Berger set forth three legal theories in support of its argument that the Ordinance did not advance a legitimate state interest.

First, Berger contended that the Board, as an entity and without reference to the actions of any individual Board member, had unreasonably delayed acting on Berger's rent increase application; had ignored factors which would have supported a greater rent increase; had considered a rate of return analysis which was not a factor specifically enumerated in the Ordinance; that the Board staff member who had prepared a rate of return analysis had primarily relied upon legal advice and had never previously prepared such an analysis; and that the Board had considered the rate of return analysis without allowing further public comment prior to reaching its $10 rent increase decision in November 1993, and that such actions by themselves were sufficient to establish an "as applied" regulatory taking.

Second, Berger contended that the City's application of the Ordinance had maintained the value of the "premium" on the sale of their mobilehomes which had been transferred to the

mobilehome owners who had occupied its Park when the Ordinance was enacted due to its lack of a vacancy decontrol provision. Berger further contended that the application of rent ordinances like Escondido's had led to a decline in the shipment of mobilehomes into California and that since the Ordinance was enacted the supply of mobilehome spaces in Escondido had decreased. Berger further contended that the Ordinance's application had reduced the supply of affordable housing to all Californians; and that the lack of a nexus between the effect of the Ordinance and its legitimate objective was sufficient to support a claim for a regulatory taking.

Finally, Berger contended that the City's implementation of its Ordinance was designed to drive down the value of all mobilehome parks in Escondido to facilitate their acquisition by City; that City had purchased two other mobilehome parks at prices below their fair market value without rent control; and that this use of the Ordinance also independently supported Berger's claims for a regulatory taking.

42. At the close of Berger's Opening Statement, counsel for City orally reiterated the Motion for Nonsuit.

43. After City's Motion for Nonsuit was made, the Court gave Berger's counsel full opportunity to amend or modify its Opening Statement to state all facts Berger intended to prove before the Court ruled on the motion. Berger's attorneys declined to make any such amendment or modification of its Opening Statement but instead decided to stand on its Opening Statement as presented in its written statement.

B. The Court bases its decision on the following Conclusions of Law:

1. The only cause of action remaining in this proceeding is inverse condemnation for an alleged regulatory taking based on the application of the Ordinance to Berger's Park.

2. In *Agins v. Tiburon* ("Agins"), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the Supreme Court held that where there is a claim for a regulatory taking only two issues need to be resolved: Was the property owner deprived of substantially all economically viable use of the property? Did the Ordinance advance a legitimate state interest?

3. By stipulating that it was not contending that it had been denied all economically viable use of its property, Berger could not meet *both* elements of the *Agins* test and therefore could not establish a regulatory taking. See *Del Oro Hills v. City of Oceanside,* 31 Cal.App.4th 1060, 1079, 37 Cal.Rptr.2d 677 (1995), *cert. denied*, __ U.S. __, 116 S. Ct. 86, 133 L.Ed.2d 43 (1995) ("[T]he United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation").

4. In any event, in a mobilehome space rent control "as applied" regulatory taking case, the two issues stated in *Agins* are synthesized into a single issue: Did the park owner receive a fair return? See *Westwinds Mobilehome Park v. Mobilehome Park Rental Review Board* ("Westwinds"), 30 Cal.App.4th 84, 95, 35 Cal.Rptr.2d 315 (1994) ("There is no ["as applied"] taking unless the ordinance deprives the property owner of substantially all economically viable uses for his land. [Citation] Here, whether Owner is deprived of a fair return depends . . . on whether the rent increase granted under the ordinance will permit Owner a fair return on its investment . . .").

Since Berger has stipulated that it is not contending that it has been denied a "fair return on Town & Country" nor that it has been denied "substantially all economically viable uses of its land," it cannot state a cause of action for an "as applied" regulatory taking.

5. The Courts have previously rejected park owner arguments that this Ordinance and other similar mobilehome

rent ordinances do not advance legitimate state interests. See *Westwinds*, *supra*, 30 Cal.App.4th at 95 & n. 7; *Yee v City of Escondido, supra*, 224 Cal.App.3d at 1353-54; see also *Sandpiper Mobile Village v. City of Carpinteria* ("Sandpiper"), 10 Cal.App.4th 542, 550-51, 12 Cal.Rptr.2d 623 (1992), *cert. denied*, 507 U.S. 1032, 113 S. Ct. 1850, 123 L.Ed.2d 473 (1993); *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 56-57, 280 Cal.Rptr. 876 (1991), *cert denied*, 503 U.S. 983, 112 S.Ct. 1665, 118 L.Ed.2d 387 (1992); *Oceanside Mobilehome Park Owners Ass'n v. City of Oceanside*, 157 Cal. App.3d 887, 897, 204 Cal.Rptr. 239 (1984).

6. In any event, this mobilehome rent regulation case does not "trigger" the *Nollan/Dolan* "heightened standard of scrutiny" because it is not one of the "relatively narrow class of land use cases" exhibiting circumstances which increase the risk that the local authority will seek to use its regulatory power to avoid the obligation to pay just compensation. See *Erhlich v. City of Culver City*, 12 Cal.4th 854, 868, 50 Cal.Rptr.2d 242 (1996); see also, *Westwinds, supra*, 30 Cal.App.4th 95 (questioning whether "heightened scrutiny" applies to this type of case).

7. The fact that a rent control ordinance may result in a diminution in value does not constitute a taking unless the owner has been deprived of substantially all economically viable use of his property. See, *Sandpiper, supra*, 10 Cal.App.4th at 550. Here, since Berger has stipulated it is not contending that it had been denied "all economically viable use of its property," the fact that the market value of Berger's park may be less than it would be in the absence of the Ordinance does not establish an "as applied" regulatory taking.

8. Berger's contentions concerning the alleged conduct by the Board and its staff, while arguably relevant to a Writ of Administrative Mandamus action or a due process challenge, is insufficient to establish an "as applied" regulatory taking not only because the Board subsequently held a new hearing and

granted Berger a higher rent increase "mooting" Berger's Writ action, but also because Berger does not contend that the Board's decision denied it a "fair return" nor denied it "substantially all economically viable use of its land."

9. Berger's contentions that the alleged "premium" given to the existing residents by the Ordinance's lack of a vacancy decontrol provision is being "maintained" by the City's "application" of its Ordinance is in fact a "facial claim" rather than an "as applied" regulatory taking claim. See *Levald v. City of Palm Desert* ("Levald"), 998 F.2d 680, 689 (9th Cir. 1993) *cert. denied*, _ U.S. _, 114 S. Ct. 924, 127 L.Ed.2d 217 (1994) ("It is not a particular *application* of the statute that gives rise to the premium; the premium arises from the existence of the statute itself").

Such a facial taking claim is barred by applicable statutes of limitations (*Levald*, *supra*, 998 F.2d at 686-89); by Berger's "lack of standing" to facially challenge the Ordinance (see, *e.g.*, *Carson Harbor Village Ltd. v City of Carson* ("Carson Harbor"), 37 F.3d 468, 476-77 (9th Cir. 1994) (property owner had no standing to facially challenge the "premium" granted by a mobilehome rent control ordinance because it did not own the property at the time the ordinance was enacted); by res judicata/collateral estoppel based on the dismissal of Berger's prior taking challenges to this same Ordinance (see, *e.g.*, *H.N and Frances C. Berger Foundation v. City of Escondido*, U.S. Dist. Ct. S.D. Cal., Case No. 91-0153K (BTM) (prior federal facial taking challenge to Ordinance dismissed based on res judicata effect of *Yee, supra*, 224 Cal. App.3d 1349)), and because such a challenge fails to state a facial regulatory taking claim. See, *e.g.*, *Sandpiper, supra*, 10 Cal.App.4th at 549-51.

10. Berger's contentions concerning an alleged decline in the shipment of mobilehomes into California and a decline in the number of mobilehome spaces in Escondido does not support an "as applied" regulatory taking claim as to Berger's property,

especially in light of the fact that Berger is not claiming that *it* did not receive a "fair return."

11. Since Berger does not allege that it has ever attempted to sell *its* park (see Berger's Opposition to Motion for Nonsuit at 8) and has stipulated that *it* is not claiming that *it* did not receive a "fair return," it has no standing to argue that the City's application of the Ordinance was designed to drive down the value of mobilehome parks to facilitate their acquisition by the City or that *other* parks were acquired by the City at less than their fair market value. See *Carson Harbor, supra*, 37 F.3d at 475 (park owner's "as applied" taking challenge to conversion law was unripe where it "had not taken any measures indicating a present intention to sell or convert its property"); *Yee, supra*, 118 L.Ed.2 at 165-166 (same).

12. The above appellate court decisions, including especially *Westwinds, supra,* are binding on this Court on the issue of regulatory takings in a mobilehome space rent regulation context. See *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321 (1962)

13. Since Berger does not allege any specific wrongful actions by any of the individually named Respondents/ Defendants (Jerry Harmon, Sid Hollins, Richard A. Foster, Lori Holt Pfeiler, and Elmer Cameron), it fails to state a cause of action against them in their individual capacities. In any event, an inverse condemnation claim can only proceed against a public entity or a private party which has authority to exercise the power of eminent domain. None of the named individual Respondents/Defendants are public entities or private parties with such authority in their individual capacities.

Counsel for the City is hereby directed to prepare forthwith a Judgment which is consistent with the contents hereof, submit same to opposing counsel for approval as to form, and then submit same to this Court for signature, filing, and entry.

DATED: Aug 19, 1996.

/s/ KENNETH G. ZIEBARTH
HON. KENNETH G. ZIEBARTH, JR.
JUDGE OF THE SUPERIOR COURT, RETIRED

* RETIRED JUDGE OF THE SUPERIOR COURT
SITTING UNDER ASSIGNMENT OF THE
CHAIR PERSON OF THE JUDICIAL COUNCIL

Appendix E-1

Effective 7/8/88

AN ORDINANCE OF THE CITY OF ESCONDIDO ESTABLISHING MOBILEHOME RENT PROTECTION

1. Definitions. For the purposes of this ordinance, the following words, terms, and phrases shall be defined as follows:

   (a) Board shall mean the Mobilehome Park Rental Review Board of the City of Escondido.

   (b) Capital improvement shall mean the installation of new improvements and facilities and/or the replacement or reconstruction of existing improvements and facilities which consist of more than ordinary maintenance and/or repairs.

   (c) *Department shall mean the Community Development Department of the City of Escondido.

   (d) Mobilehome shall mean a vehicle designed and equipped for human habitation and which is used as the principal place of habitation for the occupants thereof.

   (e) Mobilehome park shall mean any area of land within the City of Escondido where two (2) or more mobilehome spaces are rented, or held out for rent, to accommodate mobilehomes used for human habitation.

   (f) Mobilehome space shall mean the site within a mobilehome park intended, designed, or used for the location or accommodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith.

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* For clarification, Rent Review is administered by the Community Services Department and all questions should be directed to them.

(g) Owner shall mean the owner or operator of a mobilehome park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of such park.

(h) Rehabilitation work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

(i) Rent shall mean the consideration paid for the use or occupancy of a mobilehome space.

(j) Rental increase shall mean any increase in rent charged by an owner to a tenant, including but not limited to lease offers, lease renewal offers, and increase in monthly rents.

(k) Tenancy shall mean the right of a tenant to use or occupy a mobilehome space.

(l) Tenant shall mean a person who has a tenancy in a mobilehome park.

2. The Mobilehome Park Rental Review Board.

(a) The City Council of the City of Escondido shall serve as the Mobilehome Park Rental Review Board.

(b) The Board shall establish the time of any hearings or meetings held pursuant to this Ordinance and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder.

(c) Three (3) members shall constitute a quorum for the purpose of conducting a hearing or meeting. Decisions of the Board shall be made by a majority vote of the members present.

(d) The duties and responsibilities of the Board shall include the hearing of all rent increase applications and determine either to approve or disapprove a rent increase in the manner provided for herein.

3. Base Rent. Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. If a previously rented mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986. If a mobilehome space is rented for the first time after January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent first charged for the space. No owner shall send it notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, an owner shall not demand, accept or retain rent exceeding the rent in effect on January 1, 1986, for a mobilehome space that was not regulated by this section prior to January 1, 1986. If such mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986.

4. Permitted Rent Increases Based Upon an Application Approved by the Board.

(a) An owner may file with the Department a rent increase application for one or more mobilehome spaces for approval by the Board.

(b) An application for a rent increase pursuant to this section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee which will be determined by the Board;

provided, however, that no fee shall be charged for applications filed within the first one hundred eighty (180) days after the effective date of this Ordinance. Said application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, and the facts supporting the requested increase. The applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to made a determination whether to approve a rent increase. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department.

(c) Upon receipt of a rent increase application, the Department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and the address where such statements or documents may be mailed or delivered.

(d) The Department shall determine within thirty (30) days after receipt of a rent increase application whether said application is complete. If the Department determines that said application is not complete, it shall notify the applicant in writing as to what additional information is required.

(e) A copy of each rent increase application shall be provided to each member of the Board after such

application is determined to be complete. The Board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in subsection (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing.

(f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the Department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. Except as provided in subsection (j), within fifteen (15) days after the close of the hearing, the Board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application.

(g) The Board shall approve such rent increase as it determines to be just, fair and reasonable. The Board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination:

(1) Changes in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area published by the Bureau of Labor Statistics.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.

(3) The length of time since either the last hearing and final determination by the Board on a rent

increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

(h) The Board may provide that an increase in rent or a portion of an increase in rent granted by the Board be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement including interest. Such increase granted as a result of the capital improvement shall not continue

beyond the time necessary for reasonable amortization of the cost of such improvement.

(i) Notice of the Board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the Board shall be final.

(j) In the event that the Board is unable to act and make its final determination on a completed rent increase application within the time limitations prescribed by subsection (d)-(f) of this Section, and after the thirty (30) days for the tenant to file statements or documents in opposition to the application under subsection (c) shall have expired, the Board may approve such interim increase for the mobilehome space or spaces specified in said application which clearly appears to be warranted when the factors set forth in subsection (g) of this Section are considered, based upon the facts stated in the application, any written statements or documents filed with the Department by the affected tenants, and any other facts known to the Board. An approved interim rent increase shall expire on either (1) the last day of the month within which the Board makes its final determination disapproving a rent increase, or (2) the effective date of a rent increase which is approved by a final determination of the Board.

(k) The time within which the Board my conduct a hearing as provided in subsection (c) or make its determination as provided in subsection (f) may be extended twice by the Board for periods of time not to exceed sixty (60) days each if the Board approves an interim rent increase pursuant to subsection (j).

5. Fees. A tenant whose tenancy is not regulated by the provisions of the Mobilehome Residency Law shall not be charged a fee for anything other than rent or utilities with the

exception of incidental reasonable charges for services actually rendered.

6. Permissible Reasons for Terminating or Refusing to Renew a Tenancy.

(a) A tenancy which is not subject to the provisions of the Mobilehome Residency Law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons:

(1) Failure of the tenant to comply with a local ordinance or State law or regulation relating to mobilehomes within a reasonable time after the tenant receives a notice of noncompliance from the appropriate governmental agency.

(2) Conduct by the tenant, upon the mobilehome park premises, which constitutes a substantial annoyance to other tenants.

(3) Failure of the tenant to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the tenant shall constitute such failure to comply unless and until the owner has given the tenant written notice of the alleged rule or regulation violation and the tenant has failed to adhere to the rule or regulation within seven (7) days.

(4) Nonpayment of rent, utility charges, or reasonable incidental service charges.

(5) Condemnation of the mobilehome park.

(6) Change of use of the Mobilehome Park, provided that the provisions of subsection (f) of Section 79856 of the California Civil Code are followed.

(a) The owner gives the tenant written notice of the proposed change twelve (12) months or more before the date of the proposed change.

(b) The owner gives each proposed tenant whose tenancy will commence within twelve (12) months of the proposed change written notice thereof prior to the inception of his tenancy. (b) Notice of termination or refusal to renew must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the owner is relying.

7. Refusal of Tenant to Pay Illegal Rent. A tenant may refuse to pay any rent in excess of the maximum rent permitted by this Ordinance. The fact that such unpaid rent is in excess of the minimum rent shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent

8. Remedies.

(a) Any person who demands, accepts or retains any payment of rent in violation of the provisions of this ordinance shall be liable in a civil action to the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the mount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could be lawfully demanded, accepted, or retained together with reasonable attorney's fees and costs as determined by the Court.

(b) Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor and shall be punishable in the manner provided by Section 1-13 of the Escondido Municipal Code.

9. Severability. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such decision shall not affect the validity of the remaining portion thereof.

*30319 West's Ann.Cal.Civ.Code § 798
EXCERPTS

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 2. PROPERTY
PART 2. REAL OR IMMOVABLE PROPERTY
TITLE 2. ESTATES IN REAL PROPERTY
CHAPTER 2.5. MOBILEHOME RESIDENCY LAW
ARTICLE 1. GENERAL

§ 798. Citation of chapter

This chapter shall be known and may be cited as the "Mobilehome Residency Law."

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy, except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and

Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner. The copy may be sent by regular mail or by certified or registered mail with return receipt requested, at the option of the management. If the homeowner has not paid the rent due within three days after notice to the homeowner, and if the first notice was not sent by certified or registered mail with return receipt requested, a copy of the notice shall again be sent to the legal owner, each junior lienholder, and the registered owner, if other than the homeowner, by certified or registered mail with return receipt requested within 10 days after notice to the homeowner. Copies of the notice shall be addressed to the legal owner, each junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

***30451 West's Ann.Cal.Civ.Code § 798.73**

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.73. Removal upon sale to third party; conditions

The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement. However, in the event of a sale to a third party, in order to upgrade the quality of the park, the management may require that a mobilehome be removed from the park where:

(a) It is not a "mobilehome" within the meaning of Section 798.3.

(b) It is more than 20 years old, or more than 25 years old if manufactured after September 15, 1971, and is 20 feet wide or more, and the mobilehome does not comply with the health and safety standards provided in Sections 18550, 18552, and 18605 of the Health and Safety Code and the regulations established thereunder, as determined following an inspection by

the appropriate enforcement agency, as defined in Section 18207 of the Health and Safety Code.

(c) The mobilehome is more than 17 years old, or more than 25 years old if manufactured after September 15, 1971, and is less than 20 feet wide, and the mobilehome does not comply with the construction and safety standards under Sections 18550, 18552, and 18605 of the Health and Safety Code and the regulations established thereunder, as determined following an inspection by the appropriate enforcement agency, as defined in Section 18207 of the Health and Safety Code.

(d) It is in a significantly rundown condition or in disrepair, as determined by the general condition of the mobilehome and its acceptability to the health and safety of the occupants and to the public, exclusive of its age. The management shall use reasonable discretion in determining the general condition of the mobilehome and its accessory structures. The management shall bear the burden of demonstrating that the mobilehome is in a significantly rundown condition or in disrepair. The management of the park shall not require repairs or improvements to the park space or property owned by the management, except for damage caused by the actions or negligence of the homeowner or an agent of the homeowner.

***30454 West's Ann.Cal.Civ.Code § 798.74**

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park and that the selling homeowner or his or her agent give notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior

tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be held liable for all damages proximately resulting therefrom.

***30455** (b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee,

or a portion thereof, to defray its administrative costs under this section.